Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

RONNIE WAYNE OWEN,

Petitioner,

vs.

CHEVRON, USA, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD HOBBS BARKER, IV
BARKER & BOYER, LLP
Place St. Charles
201 St. Charles Ave., Ste 2413
New Orleans, LA
70170-2413
Telephone: (504) 525-7210

MACK E. BARHAM
ROBERT E. ARCENEAUX*
BARHAM & ARCENEAUX, PC
Poydras Center
650 Poydras St., Ste 2700
New Orleans, LA
70130-6161
Telephone: (504) 525-4400

*Counsel of Record

Attorneys for Petitioner, Ronnie Wayne Owen

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

65 pp

QUESTION PRESENTED

Does Section 905(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, immunize a contractor who is not liable for and has not paid worker's compensation benefits from tort liability to its subcontractor's employee merely because the subcontractor's employee might be a "borrowed servant" of the contractor?

PARTIES TO THE PROCEEDING

Ronnie Wayne Owen

Petitioner

Chevron, USA, Inc.

Respondent

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ronnie Wayne Owen, respectfully petitions this Honorable Court to issue a writ of certiorari to the decision of the United States Court of Appeals for the Fifth Circuit dated October 19, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated October 19, 1993 is not reported, and is contained herein at pages 1a through 13a of the appendix attached hereto.

The Order and Reasons of the United States District Court for the Eastern District of Louisiana dated January 25, 1993 (entered January 26, 1993) is not reported, and is contained herein at pages 14a through 23a of the appendix attached hereto.

STATEMENT OF JURISDICTION

Petitioner seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit dated October 19, 1993. Since rehearing was not requested, the instant petition for writ of certiorari was due to be filed on or before January 17, 1994. Jurisdiction in this Court is based on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b) provides as follows:

> With respect to disability or death of an employee resulting from injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901 et seq.]. For the purposes of the extension of the provisions of

> the Longshore and Harbor Workers' Compensation Act under this section –
>
> * * *
>
> (2) the term "employer" means an employer any of whose employees are employed in such operations. . . .

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(4) provides as follows:

> The term "employer" means an employer any of whose employees are employed in maritime employment in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.)

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 904(a) reads as follows:

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a) reads as follows:

> The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband, wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

STATEMENT OF THE CASE

Respondent, Chevron, USA, Inc., ("Chevron"), is the owner of an offshore oil rig in the West Delta 30 field in the Gulf of Mexico. It is also the operator of the rig, acting as general contractor to engage various specialty services needed for the business of the rig. On April 4, 1991, Chevron contracted with Horton Wireline Service, Inc. to provide wireline services to the West Delta 30

platform. Petitioner, Ronnie Wayne Owen ("Owen"), was hired by Horton in July of 1990, and was assigned by it to the West Delta 30 field rig to fulfill the terms of the Chevron/Horton contract.

On April 28, 1991, grating upon which Owen was standing gave way, resulting in a serious fall that has left Owen permanently and totally disabled. Owen filed suit against Chevron, alleging negligence and strict liability.

Since Owen's injury occurred on the outer continental shelf, the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b) controls, and mandates that compensation for his injuries be subject to the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq. See Moore v. Phillips Petroleum Co.*, 912 F.2d 789, 791 (5th Cir. 1990). Section 905 of the LHWCA grants immunity from tort liability to all employers in exchange for their reciprocal obligation of providing injured employees with compensation benefits on a no-fault basis.

Chevron invoked § 905 of the LHWCA, contending that Owen was a "borrowed employee" and that Chevron was thus entitled to that section's tort liability shield. The district court granted summary judgment to Chevron, finding that, under the test developed by the United States Fifth Circuit Court of Appeals, there were no material facts in dispute as to Owen's status as a "borrowed employee," a characterization which the court held was essentially one for legal determination. *See* 22a, *infra.* This holding was made despite the fact that Chevron's contract with Horton expressly denominated Horton and its employees "independent contractors," and contained a

clause stating that Horton's employees were not employees of Chevron, provisions which undoubtedly influenced Chevron's decision to answer interrogatories in this case vigorously denying that Owen was its employee. *See* 6a, *infra*.

In an opinion not designated for publication, the United States Fifth Circuit Court of Appeals affirmed. After validating that Owen was a "borrowed employee" as a matter of law under the analysis previously adopted by that court (*see* 3a-10a, *infra*), the court turned to Owen's contention that 1984 amendments to the LHWCA left no room for the jurisprudentially-created rule that allows non-employers to escape tort under the guise of the general common law "borrowed employee" doctrine. Rather than addressing the merits of Owen's contention, the appellate court merely noted that it had previously addressed this issue in two other cases, and that it was powerless to revisit the issue because it could not "overrule the holding of a previous panel of our circuit." 12a, *infra*.

REASONS FOR GRANTING THE WRIT

LHWCA tort immunity from claims of "borrowed employees" was first granted in *Ruiz v. Shell Oil Company*, 413 F.2d 310 (5th Cir. 1969), relying on a line of cases, including *Standard Oil Company v. Anderson*, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909), all of which concerned the *respondeat superior* liability of a general contractor to third persons for the torts committed by its "borrowed

servants." In *Ruiz*, the Fifth Circuit first applied the "borrowed employee" doctrine to give borrowing non-employers the LHWCA shield from tort liability from their "borrowed employees." *See Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1244 n. 10 (5th Cir. 1988). Once formulated, the *Ruiz* rule blossomed, and has become firmly entrenched in the Fifth Circuit, having been applied in over two dozen cases to bar tort claims against non-employers by injured workers.[1] It fact, it has even been extended and applied, as it was in this case, to bar claims in cases where the contractual agreement between the "borrowing employer" and the actual employer expressly states that each party's employees will not, under any circumstances, be considered the "borrowed employee" of the other! *See* 6a, *infra. See also Billizon v. Conoco, Inc.*, 993 F.2d 104, 106 (5th Cir. 1993).

Ruiz rested on shaky ground. By deeming non-employers "employers" entitled to tort immunity regardless of their actual obligation or payment of workers' compensation benefits to their injured "borrowed

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[1] Three other circuits have applied the "borrowed employee" doctrine to the LHWCA, although in a much more limited fashion than the Fifth. *See Vanterpool v. Hess Oil V.I. Corp.*, 766 F.2d 117, 122 (3rd Cir. 1985), limiting the application of *Ruiz* to cases where there is "some express or implied contract of hire between the borrowed employee and borrowing employer."; *Huff v. Marine Tank Testing Corp.*, 631 F.2d 1140 (4th Cir. 1980), holding that the plaintiff was a "borrowed employee" in a case where he actually "received compensation from [the borrowing employer's] insurer. . . . "; *Raymond v. I/S Caribiba*, 626 F.2d 203, 205 (1st Cir. 1980), *cert. denied*, 451 U.S. 969, 101 S.Ct. 2045, 68 L.Ed.2d 348 (1981), finding that plaintiff was not a "borrowed servant."

employees," the decision was difficult to square with the very theoretical foundation of the LHWCA's exclusivity provision – *quid pro quo*. *See Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925, 932, 104 S.Ct. 2827, 2831, 81 L.Ed.2d 768 (1984); *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 194, 103 S.Ct. 1033, 1036, 74 L.Ed.2d 911 (1983); *Ryan Stevedoring Co. v. Pan-Atlantic S.S.Corp.*, 350 U.S. 124, 129, 76 S.Ct. 232, 235, 100 L.Ed.133 (1956). Under the LHWCA, employers are given protection from tort liability in exchange for their payment of compensation benefits. In cases where the actual employer paid the compensation benefits, what were the "borrowing employers" giving in exchange for tort immunity?[2]

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[2] The Fifth Circuit has already held that application of the "borrowed servant" doctrine does not result in *both* the actual employer and the "borrowing employer" becoming liable for LHWCA compensation. *See Doucet v. Gulf Oil Corp.*, 783 F.2d 518, 523 (5th Cir. 1986), *cert. denied*, 479 U.S. 883, 107 S.Ct. 272, 93 L.Ed.2d 249 (1986) ("Doucet was already receiving compensation from Danos & Curole's insurer. Therefore, section 904(a) of the Compensation Act shielded Gulf from liability for compensation."). This holding is undoubtedly correct. It would make little or no sense to hold that *both* the real employer and the borrowing employer would be liable for the compensation, and thus both be entitled to assignment of the injured worker's right to recover damages from third parties under 33 U.S.C. § 933(b). Congress could not have intended that "[e]verything directed by the Act would be done in duplicate." *Washington Metro. Area Transit Authority v. Johnson, supra*, 467 U.S. 945, 104 S.Ct. 2839 (Rehnquist, J. dissenting). Perhaps for this reason, the courts have avoided, even in the most troubling circumstance where more than one employer contributes to an employee's injury, holding two employers jointly or jointly and severally liable for LHWCA compensation benefits. *See Port of Portland v. Director,*

The *Ruiz* line of thinking, which dispensed LHWCA tort immunity to those who had not actually incurred any compensation obligation, reached its watershed in this Court's opinion in *Washington Metro. Area Transit Authority v. Johnson, supra*. There, this Court held that under the LHWCA, contractors are immune from tort liability to the employees of its subcontractors unless the contractor "failed to honor its statutory duty to secure compensation for subcontractor employees when the subcontractor itself has not secured such compensation." 467 U.S. at 940, 104 S.Ct. at 2835. It expressly rejected the notion that a contractor was only immune when it actually pays compensation benefits as a result of the subcontractor's default. 467 U.S. at 937, 104 S.Ct. at 2834. As a result, any contractor was automatically deemed an "employer" of a subcontractor's employee, regardless of whether that employee qualified as a "borrowed servant," and that contractor was spontaneously granted tort immunity, regardless of whether it actually was called upon to fulfill its *quid pro quo* obligation of payment of compensation.

Congress responded. In 1984, it amended sections 904 and 905 (which respectively impose the duty on employers to provide compensation and grant tort immunity) to provide as follows:

OWCP, 932 F.2d 836, 840 (9th Cir. 1991); *General Ship Service v. Director, OWCP*, 938 F.2d 960, 962 (9th Cir. 1991); *Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 523 (5th Cir. 1981), and numerous cases cited therein. The farthest the courts have gone is to find that co-employers might be engaged in a "joint venture," in which case the joint venture entity is liable for compensation benefits. *See Davidson v. Enstar Corp.*, 848 F.2d 574, 577, *on rehearing*, 860 F.2d 167 (5th Cir. 1988).

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

33 U.S.C. § 904(a).

> The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband, wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a

> subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

33 U.S.C. § 905(a). The final sentence, which laid all doubt as to Congress' intention to rest, bears repeating: "For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees ***only*** if the subcontractor fails to secure the payment of compensation as required by section 904 of this title." (emphasis added).

The Fifth Circuit's first occasion to assess the impact of this 1984 revision on the *Ruiz* rule occurred in *West v. Kerr-McGee*, 765 F.2d 526 (5th Cir. 1985). There, the court considered *sua sponte* the question of whether its application of the "borrowed employee" doctrine to LHWCA cases involving contractors was still viable. In sustaining the *Ruiz* holding, and granting immunity to a contractor who had not paid compensation benefits to its subcontractor's employee, the court reasoned as follows:

> The bare language of the amendment to § 905(a) could also be interpreted as foreclosing any designation of any contractor as the employer of its subcontractors' employees – even if a borrowed-employee relationship existed – unless the subcontractor failed to secure compensation payments. If Congress meant for § 905(a) to be so read, the cases delineating indices of a borrowed employee would be obsolete. In actions such as this one, where the subcontractor paid LHWCA benefits, the general contractor would have no immunity as a matter of law.

> Another possible reading, though, is that the "shall be deemed" language of the 905(a) amendment refers only to "deeming" a contractor the employer of a subcontractor's employee when the contractor is not the employee's true employer as well. Under this view, if the contractor *is* the employee's "employer" under the borrowed servant doctrine, the contractor is liable for § 904(a) compensation, and has § 905(a) immunity, whether or not its behavior as a general contractor and insurance guarantor would cause it to be "deemed" an employer under the amended scheme.

765 F.2d at 529-30. The court thus found a "latent ambiguity" which, despite the statute's "superficial clarity," justified resort to the legislative history that, in its view, "unambiguously demonstrates that Congress' sole purpose in amending §§ 904(a) and 905(a) was to overrule *WMATA*, and not to amend the borrowed-servant doctrine or otherwise modify LHWCA law." 765 F.2d at 530.

Judge Tate disagreed.[3] He found that "[t]he statutory language is explicit and free from ambiguity." 765 F.2d 536. "The specific addition of the concluding sentence of § 905(a), 33 U.S.C. § 905(a) (1984) states that, with regard to the exclusive liability of an *'employer'* from the compensation remedy provided by the Act, a contractor shall be deemed the *employer* of a subcontractor's employees

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[3] While his separate opinion was a concurrence, Judge Tate in fact dissented from the majority's holding regarding *Ruiz*. He concurred, however, because he approved of the majority's result: a reversal of summary judgment in favor of the defendant contractor on the ground that there was a factual dispute as to whether the plaintiff was a "borrowed employee."

only if the subcontractor fails to secure the payment of compensation." 765 F.2d at 535 (italics in original).

> The statutory language is explicit, and it makes functional sense: only where an employer is liable for the compensation remedy provided by the Act is that remedy made exclusive against him for the employee's injuries. It makes no functional sense to hold that a contractor, immune under the Act from compensation remedy for injuries received by a subcontractor's employees, is nevertheless also entitled to tort immunity because of the exclusive nature of the compensation remedy accorded, not at all against the contractor, but solely against the subcontractor. It is statutorily irrelevant under the Act's compensation scheme that, for third-party tort purposes, the subcontractor's employee may be a "borrowed servant" of the contractor for whose torts the contractor may be liable.

765 F.2d at 533.

West continues to be followed by the Fifth Circuit.[4] In a string of cases, the court has been asked to reconsider the holding that *Ruiz*'s "borrowed employee" rule is consistent with Congress' explicit statement to the contrary, and on each occasion it has followed *West* without re-examination of the issue on the ground of *stare decisis*. *See*

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[4] One other circuit has joined the *West* bandwagon. *See Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 941 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1067, 111 S.Ct. 783, 112 L.Ed.2d 846 (1991). *See also Metro Machine Corporation v. Mizenko*, 244 Va. 78, 419 S.E.2d 632 (1992), where a state supreme court followed *West*.

Melancon v. Amoco Production Co., supra, 834 F.2d at 1247; *Alexander v. Chevron, USA,* 806 F.2d 526, 529 (5th Cir. 1986), *cert. denied,* 483 U.S. 1005, 107 S.Ct. 3229, 97 L.Ed.2d 735 (1987) ("We decline the invitation [to re-examine *West*]; in this circuit one panel may not overrule the holding of a previous panel"); *Capps v. N.L. Baroid-NL Industries, Inc.,* 784 F.2d 615, 619 (5th Cir. 1986), *cert. denied,* 479 U.S. 883, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986) ("Were we so inclined [to re-examine the issue], and we are not, we could not decide the issue differently than did the court in *West,* for in this circuit one panel may not overrule the holding of a previous panel."). Perhaps most telling, however, is one panel of that court's unanimous expression of discontent with *West* in *Doucet v. Gulf Oil Corp., supra.* There, the panel stated that "[i]f the question were open we might agree with Judge Tate's concurring opinion in *West,*" citing Judge Tate's conclusion that *West* did not make "functional sense." 783 F.2d at 522. Ultimately, however, the panel was forced to conclude that it was powerless to alter course: "[C]ircuit authority culminating in *West* fixes the law of this circuit." 783 F.2d at 523.

Of course, this Court is not subject to the powerlessness that the Fifth Circuit apparently feels regarding the indefensible *West* holding. This Court was not given an opportunity to address the issue when *West* was decided, no petition for certiorari having been requested. However, now that the Fifth Circuit has refused to re-examine the issue, despite its expressed skepticism with *West,* review by this Court is in order because *West* and its progeny are contrary to the clear and unequivocal

expressed intention of Congress, contrary to the legislative history of the 1984 revision to the LHWCA, and cannot be reconciled with the spirit and purposes of the LHWCA.

West divined a "latent ambiguity" from clear and unequivocal language that unambiguously leaves no room for the "borrowed employee" doctrine.

In interpreting a federal enactment, the court's task "is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Negonsott v. Samuels*, ___ U.S. ___, 113 S.Ct. 1119, 1122-23, 122 L.Ed.2d 457 (1993), citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982). *See also Norfolk & Western v. American Train Dispatchers*, 499 U.S. 117, 111 S.Ct. 1156, 1163, 113 L.Ed.2d 95 (1991). Thus, an unambiguous statute is conclusive, and no further search for legislative intention is necessary, or permitted. *See Reves v. Ernst & Young*, ___ U.S. ___, 113 S.Ct. 1163, 1169, 122 L.Ed.2d 525 (1993), and cases cited therein. In such cases, the courts *must* "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, ___ U.S. ___, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992). The courts can go no farther because "judicial inquiry is complete." *Id.*, citing *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981). *See also Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 2594, 120 L.Ed.2d 764 (1992). Courts are not free, under the guise of interpretation, "to create an exception where Congress has

declined to do so." *Freytag v. C.I.R.*, ___ U.S. ___, 111 S.Ct. 2631, 2636, 115 L.Ed.2d 764 (1991), citing *Hallstrom v. Tillamook County*, ___ U.S. ___, 110 S.Ct. 304, 309, 107 L.Ed.2d 237 (1989).

The reason for these elemental rules of statutory construction is simple:

> Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '(there is no occasion) to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.' "

Rodriguez v. United States, 480 U.S. 522, 526, 107 S.Ct. 1391, 1393, 94 L.Ed.2d 533 (1987), citing *Aaron v. SEC*, 446 U.S. 680, 695, 100 S.Ct. 1945, 1954, 64 L.Ed.2d 611 (1980).

The Fifth Circuit has avoided application of these well-established rules of construction by finding a "latent ambiguity" in the 1984 revision to the LHWCA, thus justifying its search for further legislative intention in the amendment's history. *West v. Kerr-McGee, supra*, 765 F.2d at 529-30. However, there is no "latent ambiguity" in either § 904 and § 905(a) of the LHWCA as amended in 1984 that justifies a departure from the crystalline intention of Congress as expressed in the wording of the statutes.

The 1984 revision's addition of the concluding sentence in § 905(a) could not be more articulate and distinct:

> For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees ***only*** if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

(emphasis added). This phrase makes clear Congress' intention that there be only **ONE** circumstance under which a contractor can be granted immunity from the tort suits of its subcontractor's employees – "if the subcontractor fails to secure the payment of compensation as required by section 904 of this title." As one commentator observed:

> [Under the revision, g]eneral contractors will not be able to cloak themselves with immunity from injuries caused by their negligence and at the same time avoid responsibility for the payment of workers' compensation benefits to a subcontractor's injured employee, a result which would have been allowed under *WMATA*. Instead, **general contractors remain liable for injuries to subcontractors' employees caused by the general contractor's fault, so long as the subcontractors have produced workers' compensation payments.**

Comment, *We Say What We Mean, and We Mean What We Say: the 1984 Amendments to Sections 904 and 905 of the LHWCA*, 46 La. L. Rev. 361, 371 (1985) (emphasis added).

Indeed, in cases where the "borrowed employee" defense has not been raised, the Fifth Circuit has not had

any difficulty discerning the exactness of Congress' provision. "[T]he 1984 amendments . . . provided that a contractor shall be considered the employer of a subcontractor's employees and be entitled to immunity under section 905(a) *only* if the contractor is compelled by section 904(a) to secure worker's compensation for those employees because the subcontractor fails to do so." *Louviere v. Marathon Oil Co.*, 755 F.2d 428, 429-30 (5th Cir. 1985). *See also Martin v. Ingalls Shipbuilding*, 746 F.2d 231, 233 (5th Cir. 1984) ("Because Bagwell, the subcontractor paid compensation benefits to Martin, Frigtemp [the contractor] is not Martin's 'employer.' ").

The Eleventh Circuit has reached the same conclusion:

> The 1984 amendment limits the cases in which a contractor may escape full liability to instances in which a subcontractor has affirmatively defaulted on its statutory obligation to obtain insurance, and the contractor has, in accordance with the statutory scheme, acted as a secondary or guarantee insurer. . . .

Roach v. M/V Aqua Grace, 857 F.2d 1575, 1579 n. 2 (11th Cir. 1988).

Congress' ordination that there be only **ONE** factor which can lead to a holding that a contractor is the employer of its subcontractor's employees leaves no room for such an adjudication on "borrowed employee" grounds. As Judge Tate observed in his *West* concurrence:

> This Congressional intent is made explicit by the concluding section of 905(a), as amended in 1984: 'For purposes of this ("Exclusiveness of liability") section, a contractor (here, Kerr-

> McGee) shall be deemed the employer of a subcontractor's (here, "Berry Brothers") employees *only if* the subcontractor fails to secure the payment of compensation as required by section 904 of this title.'

765 F.2d at 533 (italics in original).[5]

Nonetheless, *West* found room for the "borrowed employee" doctrine in a "latent ambiguity" in the concluding sentence of § 905(a).

> Another possible reading, though, is that the "shall be deemed" language of the 905(a) amendment refers only to "deeming" a contractor the employer of a subcontractor's employee when the contractor is not the employee's true employer as well. Under this view, if the contractor *is* the employee's "employer" under the borrowed servant doctrine, the contractor is liable for § 904(a) compensation, and has § 905(a) immunity, whether or not its behavior as a general contractor and insurance guarantor would

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[5] In post-1984 cases where the "borrowed employee" defense has been raised, the Fifth Circuit recognized, as it did in *West*, that § 905(a) at least on the surface leaves no room for a finding that a non-employer can be granted tort immunity because it "borrows" another's employee. *See Melancon v. Amoco Production Co., supra*, 834 F.2d at 147 ("The conclusion that tort immunity under § 905(a) attaches only to an employer who actually pays for his employee's worker's compensation (i.e., the premiums for the worker's compensation insurance coverage) . . . might seem to be implied by the 1984 amendment to § 905(a)."); *Capps v. N.L. Baroid-NL Industries, Inc., supra*, 784 F.2d at 618 ("Capps argues for reversal on the ground that Congress arguably abolished the borrowed employee doctrine, save for one exception , when amending section 905(a) of the LHWCA in 1984. . . . ").

> cause it to be "deemed" an employer under the amended scheme.

765 F.2d at 529-30.

This ambiguity is made of whole cloth because it places undue weight on the word "deemed." To "deem" does not mean to make something it is otherwise not. To "deem" is only "to hold; consider; adjudge, believe, condemn; determine; treat as if; construe." *Black's Law Dictionary* (5th Ed. 1979). Thus, § 905(a) expressly prohibits holding or adjudging a contractor to be an employer of a subcontractor's employee except in one single circumstance. It does not allow such a holding or adjudication on "borrowed employee" grounds.

The *West* court's construction of § 905(a) is also inconsistent with this Court's treatment of "borrowed employees." The Fifth Circuit's evasion of § 905(a) is predicated upon its view that a "borrowed employee" need not be "deemed" an employee of a contractor in order for the contractor to be entitled to immunity. However, *Standard Oil Company v. Anderson, supra,* the seminal "borrowed employee" case and the case from which *Ruiz* was crafted, expressly stated that loaned employees "become *pro hac vice* the servants of him to whom they are furnished." 212 U.S. at 221, 29 S.Ct. at 254. *See also Shenker v. Baltimore and Ohio Railroad Co.*, 374 U.S. 1, 5-6, 83 S.Ct. 1667, 1671, 10 L.Ed.2d 709 (1963). In other words, when those conditions outlined in *Anderson* are met, the "employees can be **DEEMED** *pro hac vice* employees" of the borrower. *Kelly v. So. Pac. Co.*, 419 U.S. 331, 330, 95 S.Ct. 472, 479, 42 L.Ed.2d 498 (1974) (emphasis added). Section 905 clearly prohibits the "deeming" of borrowed

employees the *pro hac vice* employees of the borrower so that the borrower becomes entitled to tort immunity except under **ONE** limited circumstance.

The Fifth Circuit's emphasis on the word "deem" is also irreconcilable with its own view of the legislative history of the 1984 revision. *West* found that the amendment was intended to accomplish nothing more than overrule this Court's decision in *Washington Metropolitan Area Transit Authority v. Johnson*, 765 F.2d at 530. However, in *Washington Metropolitan Area Transit Authority*, this Court did not "deem" a subcontractor's employees the employees of the general contractor in the sense implied by the Fifth Circuit in *West*. Instead, it expressly found that for LHWCA purposes such employees are the *actual* employees of a general contractor because "the term 'employer' as used in § 5(a) has a statutory definition somewhat broader than that word's ordinary meaning." 476 U.S. at 933-34, 104 S.Ct. at 2832. Reviewing other provisions of the Act, this Court found "ample evidence to infer that Congress intended the term 'employer' to include general contractors as well as direct employers." 467 U.S. at 934, 104 S.Ct. at 2833.

The semantical game played by *West* cannot obscure what Congress clearly intended in its 1984 enactment. Congress disagreed with this Court's holding that a subcontractor's employees could be held (or "deemed") to be the employees of a contractor except under **ONE** circumstance which may or not be present in a "borrowed employee" context – where the contractor actually pays compensation benefits. It is the payment of compensation benefits that is determinative for 905(a) purposes, not any of the other factors which are indicia of a "borrowed

employee" relationship. The Fifth Circuit's *West* holding is just the sort of judicial policy-making that Justice Rehnquist decried in his *Washington Metropolitan Area Transit Authority* dissent, and which was rebuked in the 1984 revision to the LHWCA. "[O]ne can hardly pretend that it 'adhere[s] closely to what Congress has written.' " 467 U.S. at 942, 104 S.Ct. at 2836, citing *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 617, 101 S.Ct. 1945, 1957, 68 L.Ed.2d 472 (1981).

The *West* court's unduly narrow view of the 1984 revision's legislative history was far too restrictive.

The Fifth Circuit has justified continued application of *Ruiz*'s "borrowed employee" rule on its view of the *sole* purpose of Congress' 1984 amendment to the LHWCA being to overrule *Washington Area Metropolitan Transit Authority v. Johnson, supra*, and nothing more. To be sure, the legislative history surrounding the 1984 enactment in no uncertain terms expresses Congress' dissatisfaction with that case, and expressly indicates Congress' design to overrule it. However, a correct interpretation of the legislative history, and one that does not ignore the forest for the sake of one tree, leaves no room for continued application of the "borrowed employee" doctrine to the LHWCA in order to allow non-employers who did not actually pay compensation coverage to escape tort liability.

Consider the following explanation given by the Joint Committee for the 1984 revision:

> The Conference substitute, in disapproving *WMATA v. Johnson*, achieves the following: First,

> the obligation of the contractor to secure compensation for the employee of the subcontractor is a contingent one, which is triggered only upon the failure of the subcontractor to secure compensation for its own employees. **Second, the contractor remains amenable to suit by its subcontractors' employees in those instances where the subcontractor-employer has fulfilled its statutory obligation to secure compensation for its employees.** Third, however, where the subcontractor defaults in securing compensation, thus triggering the contractor's obligation, and the latter fulfills that obligation, the contractor is deemed an "employer" for purposes of section 5(a) and therefore entitled to immunity from suit by the subcontractor's employees. Fourth, if the contractor utilizes a "wrap-up" insurance policy to provide insurance coverage for the benefit of satisfying the subcontractor's primary obligation to secure compensation, the contractor still remains amenable to suit by employees of the subcontractor; the contractor does not enjoy the immunity afforded by Section 5(a) of the Act.

H.R. Rep. No. 98-1027, 98th Cong. 24, reprinted in 1984 U.S. Code Cong. and Ad. News 2661, 2773 (emphasis added). There is nothing ambiguous about Congress' intention as expressed by the Committee. Congress clearly desired that two goals be fulfilled: (1) to ensure that compensation would be paid by all injured employees covered by the LHWCA, and (2) to prevent persons who are not liable for *and* do not actually pay compensation benefits from claiming the benefit of tort immunity under that Act. The first goal is fulfilled by making contractors secondarily liable for compensation, a

liability only triggered in the event of subcontractor default. The second goal is achieved by limiting the grant of tort immunity to only those persons who actually pay compensation benefits.

Judge Tate in his *West* concurrence had no difficulty in taking the macro-view of the 1984 amendment, and in recognizing that its history compels a conclusion that Congress disapproves of the *Ruiz* "borrowed employee" rule:

> The Congressional Report did not refer to this thin line of mostly Fifth Circuit jurisprudence [granting contractor's tort immunity from claims by their borrowed servants, which is] totally inconsistent with the general purposes and express language of the 1984 amendments. I do not find that the absence of reference to these decisions, the brief conclusory statement of the legislative report, as any indication that the Congress desired to preserve the precedential effect of all and any pre-1984-Amendment judicial decision, or especially of any that were completely contrary to the unambiguous language of the 1984 amendments – which was specifically intended to clarify that a general contractor enjoyed no tort immunity as to work-injuries sustained by a subcontractor's employee, where that subcontractor had (as here) secured the payment of the injured employee of compensation benefits accorded him by the Act.

765 F.2d at 534.

Judge Tate's conclusion is sound. Aside from the clarity of the 1984 revision, if Congress had intended to

do nothing more than overrule *Washington Metropolitan Area Transit Authority of Johnson, supra,* it could have amended § 905(a) as follows: the contractor's contingent liability to pay compensation benefits does not automatically deem it an "employer" for purposes of this section. This verbage would have directly reversed the *Washington* holding, and would have left room for all other jurisprudence, including *Ruiz* and its progeny. Instead, however, Congress specified the **ONE** circumstance in which a contractor can be held to be an employer of its subcontractor's employees. This provision accomplished the overruling of the *Washington Area Metropolitan Transit Authority* case, and also invalidates any other holdings inconsistent with this language. *See, e.g., Morales v. Trans World Airlines, Inc.,* ___ U.S. ___, 112 S.Ct. 2031, 2038, 119 L.Ed.2d 157 (1992), where this Court refused to accept a legislative history-supported restrictive interpretation of broad and unequivocal statutory language, noting that "[s]uffice it to say that legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning."

Washington Area Metropolitan Transit Authority v. Johnson, supra, was obviously the catalyst for the 1984 revision, since the holding of that case is at odds with the revision's objectives. However, that fact does not limit the legislative history as suggested by the Fifth Circuit. The legislative history also supports a Congressional intention to void *any* jurisprudential doctrine inconsistent with the expressed goals, an intention which, as explained above, would include abrogation of the *Ruiz* line of jurisprudence. Congress' failure to expressly mention this

string of cases is hardly surprising: Congress could hardly be expected to take notice of a circuit-court created rule only in application in a few circuits,[6] and which has never been addressed by this Court. This Court's definitive ruling in *Washington Metropolitan Area Transit Authority v. Johnson, supra,* attracted Congress' attention; Congress leaves to this Court the responsibility of ensuring that the lower circuit courts do not stray from its expressed intention.

West rests upon a false fundament.

As explained above, the LHWCA's underlying principal is reciprocity: the employee exchanges uncertain tort recovery for guaranteed compensation benefits. *See Washington Metropolitan Area Transit Authority v. Johnson, supra; Lockheed Aircraft Corp. v. United States, supra; Ryan Stevedoring Co. v. Pan-Atlantic S.S.Corp, supra.* Cognizant of the fact that tort immunity can hardly be justified when its claimant gives no *quid pro quo, West* attempted to justify its holding by noting in *dicta* that the "borrowing employer" is "liable for § 904(a) compensation." 765 F.2d at 530.

This unexplained statement is false. The 1984 amendment to § 904(a) codifies the fact that contractors are only contingently liable to a subcontractor's employees for

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[6] Indeed, 24 of the 27 decisions that appear to have applied the "borrowed employee" doctrine to the LHWCA have emanated from the Fifth Circuit. This seems to be a Fifth Circuit problem, and one which the Fifth Circuit apparently feels impotent to correct.

LHWCA benefits.[7] As Judge Tate observed in his *West* concurrence.

> [§ 904(a)] provides that a "contractor (such as Kerr-McGee) be liable for . . . the payment of compensation . . . only if a subcontractor (such as Berry Brothers) fails to secure the payment of compensation." Since the subcontractor Berry Brothers *did* secure the payment of the Act's benefits to its injured employees, the contractor Kerr-McGee, the present defendant is not liable for compensation benefits.

765 F.2d at 532-33.

Thus, the only *quid pro quo* that a "borrowed employee" gets from a contractor is the guarantee that compensation benefits will be paid in the event of subcontractor default. However, the 1984 revision was an express disapproval of this Court's *Washington Metropolitan Area Transit Authority* holding that such a guarantee was sufficient to warrant a grant of tort immunity:

> If the subcontractor has secured LHWCA benefits for his employees, an injured employee will receive compensation benefits from his subcontractor employer, and in exchange the subcontractor employer is entitled to immunity. However, under the reasoning of *WMATA*, the general contractor who also secures LHWCA benefits for the subcontractor's employees receives the same immunity without having to provide any compensation to the injured employee. **The securing of benefits which have**

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[7] Nor is there any room to find the actual employer and the "borrowing employer" both liable. *See* note 2, *supra*.

> **already been secured are of little value to an injured worker. It is difficult to explain the granting of immunity to a general contractor who has provided no tangible benefits in terms of the rationale upon which workers' compensation was established.**

Comment, *supra,* 46 La. L. Rev. at 373.

It is fitting to again turn to the lucid and compelling *West* concurrence, for a final explanation of how the *quid pro quo* principle that underpins the LHWCA is violated by the *Ruiz* line of thinking:

> Under the present facts, Kerr-McGee (the contractor) was not statutorily liable to the plaintiff West for compensation benefits under the Act, for West's payroll employer, Berry Brothers (Kerr-McGee's subcontractor) had secured payment of the Act's compensation benefits to its employees injured at work on the Kerr-McGee premises. Likewise, not being an "employer" liable for compensation benefits under the Act, Kerr-McGee is unambiguously not accorded by the Act any immunity from tort suit, in this immunity being essentially grounded on the exclusive nature of the Act's compensation remedy when accorded against an *"employer"* liable for such compensation benefits.

765 F.2d at 535 (italics in original). Given that the *Ruiz* rule "makes no functional sense" and is totally at odds with the principal on which the LHWCA is constructed, it is hardly surprising that the four of the six members of

the Fifth Circuit who have studied this issue would overrule *West* if they were free to do so.[8]

CONCLUSION

For the reasons expressed above, petitioner, Ronnie Wayne Owen, respectfully requests this Court to grant certiorari in this case.

Respectfully submitted,

RICHARD HOBBS BARKER, IV
BARKER & BOYER, LLP
Place St. Charles
201 St. Charles Ave., Ste 2413
New Orleans, LA
70170-2413
Telephone: (504) 525-7210

MACK E. BARHAM
ROBERT E. ARCENEAUX*
BARHAM & ARCENEAUX, P.C.
Poydras Center
650 Poydras St., Ste 2700
New Orleans, LA
70130-6161
Telephone: (504) 525-4400

* Counsel of Record

Attorneys For Petitioner, Ronnie Wayne Owen

[8] The three members of the *Doucet v. Gulf Oil, supra,* panel joined the concurring judges in *West* to state that *West* "makes no functional sense." *See* 783 F.2d at 523.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3161
Summary Calendar

(Filed: October 19, 1993)

RONNIE WAYNE OWEN,
Plaintiff-Appellant,

RICHARD H. BARKER, IV,
Movant-Appellant,

versus

CHEVRON U.S.A. INC.,
Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana

(CA-92-2510 "F" (4))

Before REAVLEY, SMITH and DEMOSS, Circuit Judges.

REAVLEY, Circuit Judge:*

Ronnie Owen (Owen) brought this suit against Chevron U.S.A. Inc. (Chevron) seeking damages for alleged

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

injuries he suffered while working on one of Chevron's offshore platforms. The district court granted summary judgment in favor of Chevron, on grounds that Owen was a "borrowed servant" under Fifth Circuit precedent, and that Chevron was therefore immune from suit under § 5(a) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(a) (1986). Owen appeals, arguing that Chevron did not meet its burden of establishing its entitlement to summary judgment. We affirm.

INTRODUCTION

Owen slipped and fell on April 28, 1991. The accident occurred on a fixed platform owned by Chevron and located in its West Delta 30 oil and gas production field, off the coast of Louisiana. At the time, he was a wireline operator nominally employed by Horton Wireline Service, Inc. (Horton). From the time he went on Horton's payroll in July of 1990 until the date of his accident, Horton assigned him to work exclusively for Chevron in the West Delta 30 field.

Since the accident occurred on the Outer Continental Shelf, the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356, provides at § 1333(b) that compensation for his injuries is governed by the LHWCA, 33 U.S.C. §§ 901-950. Section 5(a) of the LHWCA, 33 U.S.C. § 905(a), mandates that workers' compensation as provided in the LHWCA is the exclusive remedy for an employee against his employer. The district court ruled that, under the "borrowed servant" doctrine, Owen was the borrowed servant of Chevron; Chevron was therefore his

"employee" under the LHWCA, and the state-law claims asserted against Chevron in this suit were barred.

DISCUSSION

In determining whether a summary judgment was appropriate, we review the record and the pleadings independently, viewing all fact questions in a light most favorable to the nonmovant. *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We find that no material issues of fact are in dispute, and that even if all the evidence presented and inferences therefrom are considered in the light most favorable to Owen, he was a borrowed servant as a matter of law.

This court looks to nine factors in deciding whether the borrowed-servant doctrine applies:

(1) Who had control over the employee and the work he was performing, beyond mere suggestion of details or cooperation?

(2) Whose work was being performed?

(3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employee?

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

(6) Who furnished tools and place for performance?

(7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee?

Billizon v. Conoco, Inc., 993 F.2d 104, 105 (5th Cir. 1993). The question of borrowed-servant status is a question of law for the district court to determine, although in some cases factual disputes must be resolved before the district court can make its determination. *Id.*; *Brown v. Union Oil Co., of Cal.*, 984 F.2d 674, 677 (5th Cir. 1993).

As to the first factor, Chevron personnel gave Owen all of his work assignments for the entire period he was working at Chevron's West Delta 30 field. Chevron had control over when and where Owen worked and what particular jobs he performed. Horton's only directive to Owen was to do whatever Chevron asked of him. Owen would only call Horton when he had a problem, and the record indicates that at most his calls to Horton occurred above once a week. Under these circumstances the first factor favors borrowed-servant status. *Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1245 (5th Cir. 1988) ("[Plaintiff] took orders from [defendant's] personnel who told him what work to do, and where to do it."). The fact that Owen was highly skilled and completed his assigned tasks without direct supervision does not compel a different result. *Id.* at 1241, 1245 ("[Plaintiff], of course, chose the *manner* in which to do his welding work according to

his professional judgment, but [defendant's personnel] could tell [plaintiff] when to do the welding work and when to do other kinds of work. . . . The fact that [plaintiff] had specialized welding skills he utilized in most of his work and none of the [defendant's] personnel had similar welding expertise does not bar a finding of 'borrowed employee' status."). Likewise, evidence submitted by Owen indicating that he supervised a helper, also nominally employed by Horton, is immaterial. The focus of the first factor is on which employer – Horton or Chevron – exercised control over Owen, not on whether Owen controlled subordinates.

The second factor, which looks to whose work was being performed, also favors Chevron, since Owen's work while on the payroll of Horton was performed at a Chevron site, for the benefit of Chevron's offshore oil and gas business. His work was essential to maintaining the production of oil and gas from the West Delta 30 field. *Compare Melancon*, 834 F.2d at 1245 ("As to the second factor, there can be no doubt that [defendant's] work was being performed by [plaintiff]. [Plaintiff's] work assisted [defendant] in the production of hydrocarbons by maintaining the production equipment and platforms in [defendant's] field.").

The third factor asks whether there was an agreement, understanding, or meeting of the minds between the original and borrowing employee. As in similar cases appealed to this court, a written agreement between Chevron and Horton contains language describing the service contractor's status as that of an independent contractor. The Master Service Order and Agreement between Chevron and Horton states that Horton "shall

perform the services as that of an independent contractor and not as an employee of" Chevron. A separate one-page Service Order and Agreement listed Horton as the "Contractor" and was signed by Owen on behalf of the Contractor, but this document has no language regarding Horton's or Owen's status as an independent contractor versus an employee.

Language virtually identical to that in the Master Service Order and Agreement, found in another Chevron agreement, was held insufficient to defeat summary judgment when the remaining factors pointed toward borrowed-servant status. In *Alexander v. Chevron, U.S.A.*, 806 F.2d 526 (5th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987), the agreement between Chevron and another service contractor contained, as here, language that the service contractor "agrees to perform the work as an independent contractor and not as an employee of" Chevron. *Id.* at 528. The court noted that the language did not "purport to prohibit Chevron from becoming the borrowing employer of [the service contractor's] payroll employees." *Id.* The *Alexander* court distinguished two cases cited by Owen, *West v. Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir. 1985), and *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375 (5th Cir. 1985). It noted that in both of those cases the agreements in question stated that neither the service contractor nor its *employees* shall be deemed an employee of the defendant. *Id.* Further, we noted in *Melancon* that "parties to a contract cannot automatically prevent a legal status like 'borrowed employee' from arising merely by saying in a provision in their contract that it cannot arise," and that the reality of the worksite and the parties' actions in carrying out the agreement can

implicitly modify, alter, or waive its provisions. 834 F.2d at 1245. Here, as in *Melancon*, the plaintiff understood that he would be taking his instructions from Chevron as to his job assignments. He received the same transportation, food and lodging as the other Chevron employees. *Compare West*, 765 F.2d at 531 (finding summary judgment inappropriate in part because borrowing employer's preferential treatment "in transportation and bunking arrangements is inconsistent with the notion that a borrowed servant differs from a true employee only as a paper formality.") Based on all the evidence, we conclude that the third factor is either neutral or only slightly favors Owen.

Under the fourth factor, Owen acquiesced in the work situation. He performed all of the tasks Chevron asked of him without question, including tasks that did not involve wireline work. He never complained about his assignment to Chevron or requested a transfer to another site. This factor focuses on whether the employee was aware of his work conditions and chose therefore to continue working in them, *Brown*, 984 F.2d at 678, and therefore favors a finding that Owen was a borrowed servant.

The fifth factor, inquiring whether the original employer terminated its relationship with the employee, does not require the original employer to sever completely its relationship with the employee, since such a requirement would effectively eliminate the borrowed-servant doctrine. *Melancon*, 834 F.2d at 1246. The focus should be on the lending employer's relationship with the employee while the borrowing occurs. *Id.* While assigned to Chevron, Owen received all of his work

assignments from Chevron. Chevron provided his transportation to the work site as well as food and lodging. Owen worked seven days on (or more) and seven days off, and after he returned to shore he had little or no contact with Horton, except to drop off his time tickets, or pick up his paycheck or an occasional tool. He did not go into work at Horton during his days off from Chevron. This factor favors Chevron.

The sixth factor asks who furnished the tools and place of performance. Chevron furnished the place of performance, as well as transportation, food and lodging. Chevron also furnished the principal pieces of equipment – the wireline unit and lubricator – for Owen's wireline work. Although Horton furnished tool boxes, hand tools, safety equipment and certain specialized tools, we conclude that this factor favors Chevron. *See Melancon*, 834 F.2d at 1241, 1246 (finding this factor favored defendant who provided place of performance, food, lodging and transportation to welder, even though original employer provided welding machine and employee provided his own safety equipment).

The seventh factor asks whether the new employment was over a considerable length of time. Owen was assigned to Chevron for approximately nine months. This court has not established specific time periods for evaluating this factor. In our recent *Billizon* decision, we found that a period of employment of more than three months rendered this factor neutral. 993 F.2d at 106. However, we have noted that an injury occurring even on the first day of work with the borrowing employer does not necessarily preclude a finding of borrowed-servant status. *Capps v. N.L. Baroid-NL Indus., Inc.* 784 F.2d 615,

618 (5th Cir.), *cert. denied* 479 U.S. 838 (1986). Owen went on Horton's payroll in July of 1990, and his injury occurred in April of 1991. During this entire period of employment he was assigned to work for Chevron. During a prior period of employment with Horton he had also been assigned to work at Chevron sites. We conclude that this factor is either neutral or slightly favors Chevron. *See Hebron v. Union Oil Co., of Cal.*, 634 F.2d 245, 246-47 (5th Cir. 1981) (finding borrowed servant doctrine applied to employee stationed on defendant's offshore platform for approximately eight months).

The eighth factor asks who had the right to terminate Owen. Here, Chevron had the right to terminate Owen from further work at its Delta 30 field, although Chevron could not terminate Owen's employment with Horton. We have held that the proper focus when considering this factor is the borrowing employer's right to terminate the employee from his association with the borrowing employer. *Capps*, 784 F.2d at 618. We have on numerous occasions found the employee to be a borrowed servant where, as here, the defendant had the right to end its association with the employee, even though it could not discharge him from employment with the original employer. *Id.*; *Billizon*, 993 F.2d at 105; *Melancon*, 834 F.2d at 1246. This factor favors Chevron.

The ninth factor addresses who had the obligation to pay Owen. There is no dispute that Owen prepared work tickets showing his time, that Chevron would pay Horton an agreed-upon rate for Owen's time and that of his helper, and that Horton would in turn issue Owen a paycheck based on the hours reflected in his work tickets. The funds Horton used to pay Owen came from Chevron.

Under such circumstances this factor favors Chevron. *Melancon*, 834 F.2d at 1246 ("The fact that [original employer] kept a percentage of the amount [borrowing employer] was charged is not relevant. [Borrowing employer] furnished the funds from which [original employer] paid [employee], and this is the determinative inquiry for this factor.").

Owen originally testified in his deposition that his work tickets had to be approved by Chevron personnel before he could be paid. After the court granted summary judgment, counsel for Owen filed a motion for reconsideration or new trial under Fed. R. Civ. P. 59 and submitted a new affidavit signed by Owen. In this affidavit, Owen stated that Chevron personnel were not required to sign and did not sign his time tickets, and that the tickets contain printed language that the customer was required to pay Horton whether or not the customer was satisfied with the work performed. The district court treated the motion as one for relief under Fed. R. Civ. P. 60(b) and denied it. We do not find that this affidavit raises a genuine issue of material fact or otherwise alters our view that the summary judgment was properly granted.

First, a district court's ruling on a Rule 59 or Rule 60(b) motion is subject to appellate review only for an abuse of discretion, and we have noted that in ruling on such motions based on alleged newly discovered evidence, the district court should consider whether the omitted evidence was available to the moving party prior to the time for filing his response to the summary judgment motion. *Lavespere v. Niagra Mach & Tool Works, Inc.*, 910 F.2d 167, 174-75 (5th Cir. 1990) (Rule 59), *cert. denied*,

___ U.S. ___ (1993); *AG Pro, Inc. v. Sakraida*, 512 F.2d 141, 143-44 (5th Cir. 1975) (Rule 60(b)), *rev'd on other grounds*, 425 U.S. 273 (1976). We find no abuse of discretion by the district judge in denying the motion, since we find no explanation in the record for why the information asserted in the affidavit was unavailable to Owen. Indeed, Owen's affidavit only recited his knowledge of employment conditions with Chevron prior to his accident. Second, "the nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony." *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984). Third, even if the allegations in the new affidavit are taken as true and properly raised, we conclude that the ninth factor still favors Chevron. If Chevron did not have to sign off on the work tickets and was required to pay for Owen's work whether or not it was satisfied, this arrangement only seems to strengthen Chevron's obligation to pay the employee under the ninth factor.

Owen agues that certain statements in Chevron's amended answer and interrogatory answers make summary judgment inappropriate. The answer in question asserts that Owen was "nominally employed" by Horton, and asserts, in the alternative, that Owen's injuries "were caused by the acts of an independent contractor for whom Chevron is not responsible." The answer also alleges in the alternative that "recovery against Chevron is barred by the exclusive remedy provisions in the applicable workman's compensation statute." We do not see any of these statements as admission that Owen was not

Chevron's borrowed servant, the only defense raised in the motion for summary judgment.

Owen also points to Chevron's interrogatory answers filed early in discovery. At that time Chevron looked to the terms of the contract and depicted Owen as the servant only of Horton. By the time of this judgment the record clearly established that Owen was the borrowed servant of Chevron in doing his work at the time of his injury. It would have been the better procedure for Chevron to obtain the court's permission to withdraw or strike those original answers, but we will not prolong this litigation when it is clear that the parties knew by the time of the federal judgment that the original answers had been negated and abandoned.

Owen also argues that the 1984 amendments to the LHWCA make the borrowed-servant defense unavailable to a defendant who has not actually paid workers' compensation benefits to the plaintiff. The amendments added the last sentence to the current version of § 5(a) of the LHWCA, which provides that "[f]or purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title." 33 U.S.C. § 905(a). In *West* we concluded that these amendments did not alter existing jurisprudence on the borrowed-servant doctrine. 765 F.2d at 528-30. *Accord Melancon*, 834 F.2d at 1247. We cannot overrule the holding of a previous panel of our circuit. *Capps*, 784 F.2d at 619.

CONCLUSION

We have independently reviewed the record, and have reviewed *de novo* the summary judgment and the ultimate legal question of whether Owen was a borrowed servant. Applying the nine factors we are to consider, we find that all of the factors except the third and the seventh favor Chevron's position that Owen was a borrowed servant. We find that the third factor is either neutral or slightly favors Owen, and that the seventh factor is either neutral or slightly favors Chevron. Weighing all the factors, we agree with the district court that Chevron was entitled to summary judgment.

AFFIRMED.

Filed: 1/26/93

Date of Entry: 1/26/93

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONNIE WAYNE OWEN	*	CIVIL ACTION
VERSUS	*	NO. 92-2510
CHEVRON U.S.A., INC.	*	SECTION "F"

ORDER AND REASONS

Before the Court is the defendant's motion for summary judgment. For the reasons that follow, the motion is GRANTED.

I. BACKGROUND

Horton Wireline Service, Incorporated contracted with Chevron Company, U.S.A. to provide wireline operators for work in Chevron's offshore oil and gas production fields. In September 1990 Horton hired the plaintiff, Ronnie Wayne Owen, an experienced wireline operator, and assigned him to work in Chevron's West Delta 30 field.[1]

Nine months later, the plaintiff slipped and fell while working in Chevron's West Delta field. He then sued

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[1] Horton first hired Owen in 1987. Owen worked for the company for approximately a year and a half. He left Horton in 1988 and sought re-employment with Horton in September 1990. Owen suffered the present injury during this period of re-employment with Horton.

Chevron seeking recovery based on theories of strict liability and negligence. Chevron now claims protection under the borrowed servant doctrine.

II. LAW AND APPLICATION

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *See id.* Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249-50 (citations omitted).

In addition, if the party opposing the motion fails to establish an essential element of his case, summary judgment is proper. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

B. Borrowed Servant Doctrine

Section 905(a) of the Longshore and Harbor Workers Compensation Act limits the extent of an employer's liability to its employees. 33 U.S.C. § 905(a). The statute instructs that "the liability of an employer prescribed in section 904 of this title[2] shall be exclusive and in place of all other liability of such employer to the employee . . . entitled to recover damages from such employer at law or in admiralty on account of . . . injury." *Id.*

In *Ruiz v. Shell Oil Co.*, 413 F.2d 310, (5 Cir. 1969), the Fifth Circuit first recognized the "borrowed servant doctrine" as a shield for employers from tort suits by "borrowed employees" under the LHWCA. The court announced nine criteria that inform the analysis of whether an injured worker was a borrowed servant at the time of his injury:

(1) Who has control over the employee and the work he was performing, beyond mere suggestion of detail or cooperation?

(2) Whose work is being performed?

(3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employee?

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

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[2] Title 33, United States Code, Section 904 obligates an employer to pay workers' compensation benefits to his employees.

(6) Who furnished tools and place for performance?

(7) Was the new employment over a considerable length of time?

(8) Who has the right to discharge the employee?

(9) Who has the obligation to pay the employee?

Id. at 312-313. *See also, Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1244 (5 Cir. 1988).

However, "while the *Ruiz* factors inform the decision of the Court, no hard and fast rule determines borrowed employee status." *Gaines v. Chevron U.S.A., Inc., et al.*, C.A. No. 89-1592 (E.D. La. Dec. 1, 1989), *aff'd.*, C.A. No. 89-3890 (5 Cir. 1990). Indeed, "no single *Ruiz* factor, nor combination of them is decisive," *Id.*

The Court must address the *Ruiz* considerations:

(1) Control?

Owen's deposition testimony establishes that he knew that he was to take work instructions from Chevron's field foremen, Emmit Anderson and Bill Kaiser. In addition, the owner of Horton Wireline, Charles Horton, testified in this deposition that he instructed Owen to do whatever Chevron told him to do. Indeed, the evidence is clear that during the nine months of Owen's employment with Horton Wireline, the plaintiff worked for Chevron at the West Delta field and received all of his work assignments from Chevron personnel.

Nonetheless, the plaintiff now asserts that Chevron merely identified the wells on which he was to work. He contends that Chevron personnel were unable to supervise his actual work because he was a highly skilled specialist. This argument is wide of the mark.

Close supervision of skilled employees is not necessary to establish control. *See Melancon*, 834 F.2d at 1245. Chevron personnel told Owen what work to do and when and where to do it. The Court finds that Owen's work in the West Delta field was functionally under Chevron's control.

(2) Whose work?

The plaintiff performed wireline services in the West Delta field, which were essential to maintain the flow of oil and gas from Chevron's wells. Thus, under the instruction of *Melancon*, Owen performed Chevron's work. *See Melancon*, 834 F.2d at 1245.

(3) Agreement?

Chevron's written contract with Horton Wireline states that the "CONTRACTOR [Horton Wireline] shall perform [its] services as an independent contractor and not as an employee of the COMPANY [Chevron]." In the face of case decisions that are directly against Mr. Owen, the plaintiff nevertheless strenuously asserts that this clause effectively bars Owen from becoming a borrowed servant.

In *Alexander v. Chevron U.S.A.*, 806 F.2d 526, 528-29 (5 Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987), the Fifth Circuit considered the same contractual language and specifically addressed the two cases, *West v. Kerr-McGee Corp.*, 765 F.2d 526 (5 Cir. 1985), and *Alday v. Patterson Truck Lines, Inc.*, 750 F.2d 375 (5 Cir. 1985), on which the plaintiff now relies to support his position. The court observed that the terms of the contract between the employer and the payroll employer did not prohibit the borrowing company from becoming the borrowed employer of the contract. The court held that the contract did not preclude summary judgment "when the remaining *Ruiz* factors point toward borrowed servant status."

In *West* and in *Alday*, the contracts at issue expressly stated "[u]nder no circumstances shall an employee of a CONTRACTOR be deemed an employee of COMPANY; neither shall CONTRACTOR act as an agent or employee of COMPANY." *See West*, 765 F.2d at 531; and *Alday*, 750 F.2d at 377-78. And in each case, the Fifth Circuit, impressed with the language "under no circumstances," decided that the contracts clearly rejected the possibility of borrowed servant status. *West*, 765 F.2d at 528; and *Alday*, 750 F.2d at 377. Horton and Chevron did not use the language of *West* or *Alday*, and those cases provide no useful guide here.

(4) Acquiescence?

The focus of this inquiry is whether the plaintiff is aware of his work conditions and knowing of these conditions, chooses to continue working in those conditions. *Melancon v. Amoco Production Co.*, 834 F.2d at 1246; and

Gaudet v. Exxon Corp., 562 F.2d 351, 357 (5 Cir.), *reh'g denied*, 565 F.2d 1215 (1977). In this case, Horton promptly assigned Owen to work at Chevron West Delta 30 after hiring him, and Owen continued to work there until his injury.[3]

(5) Relationship terminated?

This factor looks to the employer's relationship with the employee when the borrowing occurs. *See Melancon*, 834 F.2d at 1246. And the law is settled that a lending employer need not completely sever its relationship with the employee. *Id; see also, Capps v. N.L. Baroid-NL Indus., Inc.*, 784 F.2d 615 (5 Cir.), *cert. denied*, 479 U.S. 838 (1986).

The plaintiff testified during his deposition that his contact with Horton was narrowly limited to dropping off his timesheets and picking up his paycheck. He added that he consulted Chick Horton whenever he wanted advice about a problem with a wirelining procedure, but noted that it did not happen "too often." (In fact, he testified to needing Chick's help on just one occasion.)

Although the plaintiff now asserts that Chick Horton personally supervised wireline operations "in many instances," the evidence, in particular the plaintiff's own deposition testimony, patently indicates that Chevron, not Horton, exercised daily supervision over Owen. Thus, the Court determines that this factor weighs toward a finding of borrowed employee status.

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[3] The Court also declines Owen's request to disregard *Melancon*.

(6) Tools and workplace?

Horton supplied Owen's safety equipment, hand tools, tool boxes, and specialized tools, as one might expect.

Chevron also supplied some tools, together with the wireline unit and lubricator for the plaintiff's use. And Chevron provided Owen the same transportation, lodging, and food available to Chevron's direct employees. Moreover, the plaintiff performed a substantial portion of his work at a Chevron location.

Accordingly, on balance, the Court is persuaded that Chevron's supplies and provisions for the plaintiff were sufficient to support a borrowed servant relationship.

(7) Considerable length of time?

The Fifth Circuit says that this factor is significant only when the special employer employs the employee for a considerable length of time. *See Capps*, 784 F.2d at 618.

In this case, Horton assigned Owen to work at Chevron's West Delta 30, where he continued to work for nine months until his injury. And although the length of time of employment may not seem considerable, the court is reminded of the decisions in *Champagne v. Penrod Drilling Co.*, 31 F.Supp. 1282, 1284 (W.D. La. 1971), *aff'd per curiam*, 459 F.2d 1042 (5 Cir. 1972), *cert. denied*, 409 U.S. 1113 (1973), in which the court found borrowed employee

status when the plaintiff's injury occurred on the first day of the job.

(8) Right to discharge?

Jurisprudence tells us that when assessing this factor, a court may consider whether an employer, who is unable to discharge a borrowed worker, may nonetheless terminate the worker's service with itself. *Melancon*, 834 F.2d at 1246; *Capps*, 784 F.2d at 618; and *Hebron v. Union Oil Co. of California*, 634 F.2d 245, 247 (5 Cir. 1981). Such authority, the cases conclude, tilts in favor of a borrowed employee relationship. *Id.*

The plaintiff concedes that Chevron had the authority to remove him from its offshore operations if dissatisfied with his work. Plainly, under the law, Chevron's authority implicates the borrowed servant doctrine.

(9) Obligation to pay?

Horton issued the plaintiff's payment based on time sheets which Chevron approved. And as the Fifth Circuit noted in *Alexander*, this Court finds Chevron's timesheet approval procedure is positive evidence of a borrowed employee relationship. *See Alexander*, 806 F.2d at 528.

III.

Indeed, although deciding borrowed servant status is a fact-intensive inquiry, it remains an issue of law for the court. *Melancon*, 834 F.2d at 1244. In this case, the facts support a finding on this record that the plaintiff was a

borrowed employee of Chevron, and because he was, Owen is precluded from suing the defendant in tort. Accordingly, the summary judgment motion of Chevron, U.S.A. is GRANTED.

New Orleans, Louisiana, January 25, 1993.

/s/ Martin L.C. Feldman
MARTIN L.C. FELDMAN
UNITED STATES DISTRICT
JUDGE

Filed: 1/27/93

Date of Entry: 1/28/93

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONNIE WAYNE OWEN	*	CIVIL ACTION
	*	
VERSUS	*	NO. 92-2510
CHEVRON U.S.A., INC.	*	SECTION "F"

JUDGMENT

For the written reasons of the Court on file herein, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Chevron U.S.A., Inc., and against plaintiff, Ronnie Wayne Owen, dismissing plaintiff's suit.

New Orleans, Louisiana, this 27th day of January, 1993.

/s/ Martin L.C. Feldman
UNITED STATES DISTRICT JUDGE

Filed: 2/26/93

Date of Entry: 3/1/93

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONNIE WAYNE OWEN	*	CIVIL ACTION
	*	
VERSUS	*	NO. 92-2510
CHEVRON U.S.A., INC.	*	SECTION "F"

ORDER AND REASONS

Before the Court is the plaintiff's motion for reconsideration or a new trial. For the reasons that follow, the motion is DENIED.

I. BACKGROUND

Horton Wireline Service, Incorporated contracted with Chevron Company, U.S.A. to provide wireline operators for work in Chevron's offshore oil and gas production fields. In September 1990, Horton hired the plaintiff, Ronnie Wayne Owen, an experienced wireline operator, and assigned him to work in Chevron's West Delta 30 field.[1]

Nine months later, the plaintiff slipped and fell while working in Chevron's West Delta field. He then sued

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[1] Horton first hired Owen in 1987. Owen worked for the company for approximately a year and a half. He left Horton in 1988 and sought re-employment with Horton in September 1990. Owen suffered the present injury during this period of re-employment with Horton.

Chevron seeking recovery based on theories of strict liability and negligence.

On January 27, 1993, this Court ruled that Owen was a borrowed servant and, therefore, unable to sue Chevron in tort. The Court dismissed the plaintiff's lawsuit. Owen now moves for reconsideration.

II. LAW AND APPLICATION

A. Rule 60

Rule 60 of the Federal Rules of Civil Procedure[2] states:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). . . .

Fed. R. Civ. P. 60(b) . District courts are instructed to exercise discretion cautiously when deciding whether to grant a motion for new trial based on newly discovered evidence. *AG Pro, Inv. v. Sakraida*, 512 F.2d 141, 142 (5 Cir. 1975). And the Fifth Circuit expressly discourages courts from granting such motions unless the following requirements are met: (1) the evidence must be discovered following trial; (2) facts must be alleged from which the court may infer that the movant exercised due diligence in discovering the new evidence; (3) the evidence is not

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[2] The plaintiff's motion is not timely under Rule 59 of the Federal Rules of Civil Procedure.

merely cumulative or impeaching; (4) the evidence is material; and (5) the new evidence would likely produce a new result at trial. *Id.* at 144. *See also, Ledet v. United States,* 297 F.2d 737, 739 (5 Cir. 1962).

Here, the plaintiff offers a second affidavit to present his so-called new evidence. In the affidavit, Owen points out to the Court the daily five minute safety meeting he conducted with his Horton subordinate, Ronnie Saxon. He further informs the Court that his time tickets included printed language requiring the customer (Chevron) to pay for all work performed whether satisfied or not.[3] The plaintiff argues that these facts support his contention that Chevron did not control his work nor approve his time tickets.

This testimony, however, contradicts the evidence on which Chevron relied in its summary judgment motion, principally, the plaintiff's deposition testimony and the sworn statement of Chick Horton of Horton Wireline. The Court is reminded that a party resisting summary judgment cannot defeat the motion by submitting an affidavit which directly contradicts, without explanation, his previous testimony. *Albertson v. T.J. Stevenson & Co., Inc.,* 749 F.2d 223, 228 (5 Cir. 1984); and *Kennett-Murray Corp. v. Bone,* 622 F.2d 887, 894 (5 Cir. 1980). Accordingly, because the law prohibits the plaintiff from introducing contradictory testimony as new evidence, the Court finds that Owen has failed to satisfy the requirements for relief

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[3] Owen has issued a subpoena to Horton Wireline for the Production of his time tickets reflecting work performed for Chevron.

from the outstanding judgment, and his motion for reconsideration or a new trial is DENIED. Moreover, the plaintiff's motion falls far short of all the other tests of *Sakraida*.

New Orleans, Louisiana, February 24, 1993.

/s/ Martin L.C. Feldman
MARTIN L.C. FELDMAN
UNITED STATES DISTRICT JUDGE